STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KENNETH AND ROSEMARY PHILLIPS	:	DETERMINATION DTA NO. 815489
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Nonresident Earnings Tax under the Administrative Code of the City of New York for the Years 1991, 1992 and 1993.	:	

Petitioners[1], Kenneth and Rosemary Phillips, 10 Hillside Lane, New Hope, Pennsylvania 18938, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under the Administrative Code of the City of New York for the years 1991, 1992 and 1993.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 14, 1997 at 10:15 A.M., with all briefs to be submitted by December 5, 1997, which date began the six-month period for the issuance of this determination. Petitioners appeared by Uncyk, Borenkind and Nadler, Esqs., (Eli Uncyk, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael J. Glannon , Esq., of counsel).

[1]Petitioners, Kenneth and Rosemary Phillips, filed joint tax returns and, therefore, both of their names appear in this proceeding. However, the issue in this proceeding centers on the proper tax treatment of income earned only by petitioner Kenneth Phillips. Accordingly, unless otherwise specified or required by context, references to petitioner or petitioners herein shall mean petitioner Kenneth Phillips.

ISSUES

I. Whether petitioner has established that the time spent working at an office in his home outside of New York was a necessary requirement of his job as opposed to a matter of his own convenience.

II. Whether petitioner has established that his compensation was commission income only based upon the volume of business he transacted, and that all of his customers were located outside of New York State, therefore allowing petitioner to allocate all of such compensation outside of New York State.

FINDINGS OF FACT

1. Petitioners, Kenneth and Rosemary Phillips, husband and wife, timely filed (under extension) a New York State Nonresident and Part Year Resident Income Tax Return (Form IT-203) under Filing Status "2" (Married filing joint return) for each of the years 1991, 1992 and 1993. Petitioner Kenneth Phillips also filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) for each of such years. On each of these returns, at Schedule "A" thereof, Mr. Phillips's compensation from his New York employer was allocated within and without New York State and City on the basis of the number of days worked in New York versus the number of days worked outside of New York.

2. Petitioners resided in New Hope, Pennsylvania during each of the years at issue, were not New York State or City domicilliaries, and did not maintain a place of abode in New York State or City during any of such years. It is undisputed that petitioners were therefore potentially subject to New York State and City tax only as nonresidents.

3. Following an audit, the Division of Taxation ("Division") issued to petitioners two notices of deficiency, each dated December 14, 1995, asserting additional New York State

personal income tax and New York City nonresident earnings tax due. The first of such notices covered the years 1991 and 1992, and asserted tax due for such years in the respective amounts of $27,187.77 and $24,919.33, plus interest.[2] The second such notice covered the year 1993 and asserted tax due in the amount of $12,781.14, plus interest.

4. Petitioners protested the above notices. At the commencement of proceedings the parties agreed that an initially raised issue of the timeliness of petitioners' protest for 1993 had been resolved in petitioners' favor such that 1993 was included among the years at issue in these proceedings. In addition, the parties agreed that the petition could be amended, in light of the then-recently decided ***Matter of O'Connell*** (Tax Appeals Tribunal, March 6, 1997), to include the issue of commission income and the allocation thereof based on the locations of petitioner Kenneth Phillips's customers. Finally, the parties agreed that petitioners could submit to the Division, subsequent to the hearing, documentation in support of a claim that petitioner Kenneth Phillips worked certain days outside of New York State *and* outside of the office at his home in New Hope, Pennsylvania, such that these days would be treated as non-New York State working days for purposes of income allocation.

5. Commencing in approximately May of 1988 and continuing through the years at issue and thereafter until late 1995, Kenneth Phillips was employed by Lehman Brothers (also known as Shearson, Lehman). Petitioner described himself as a bond trader and explained that he specialized in municipal bonds and in "hedging." Mr. Phillips described hedging, in general terms, as the attempt to predict or anticipate the future movement of markets and to take

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[2]The record includes a validated consent with respect to the period of limitations on assessment pursuant to which a notice of deficiency could be issued to petitioners for the year 1991 at any time on or before April 5, 1996. It is noted that petitioners' proposed finding of fact "2" lists the amount of additional tax asserted as due by the Division for 1991 as $27,919.33. Such listing represents an apparent typographical or addition error, with the correct amount being the (lesser) $27,187.77 figure listed above.

positions based thereon aimed at protecting (or enhancing) the value of customers' portfolios of bond investments. Petitioner's customers were large institutional investors, with bond investment portfolios in excess of one billion dollars, whose trades typically involved upwards of three hundred million dollars or more. Petitioner holds 11 copyrights on systems he developed expressly for the purpose of hedging on futures exchanges, including strategies related to timing and risk assessment aimed at defending the value of the bonds held by these very large institutional customers.

6. Petitioner's services to his customers included analysis and monitoring of markets and executing trading activities, potentially at all hours of the day or night, on exchanges located throughout the country and overseas. Petitioner was responsible for making a market for and trading for the accounts of customers as directed. Petitioner described this responsibility as executing a trade within minutes of a customer's direction to do so, including trades on international markets which were open during hours which did not coincide with petitioner's employer's New York City office hours. Petitioner explained that a time record is made confirming the execution of every order or trade. No such records, however, were included in evidence. Petitioner's services also included attending meetings at his employer's New York City office and providing informational seminars to other employees regarding market directions, his view of interest rate trends, hedging and the like. Petitioner's employment with Lehman Brothers ended in late 1995, and the records of petitioner's trades, according to petitioner, remained with Lehman Brothers.

7. Petitioner did not have a written employment agreement with Lehman Brothers, but rather described his employment as under a clear verbal agreement. While petitioner's brief and proposed findings of fact describe his employment as "at will" and therefore terminable

immediately by either party, petitioner nonetheless noted his belief that, because his hedge strategies were complex and involved, there was an "ethical" obligation to his employer and customers which would have prevented such immediate termination.

8. Petitioner asserted in testimony that his compensation was based on the commissions generated from the trades he made, noting that he was entitled to an annual draw against such commissions. However, according to petitioner, his actual compensation always exceeded the amount of his draw. Petitioner also claimed that the commissions generated during the years at issue were all based on sales to customers who had offices located outside of New York State.[3] He also noted that he brought certain customer accounts with him when he commenced employment with Lehman Brothers, and that these accounts brought in more than petitioner's draw amount and, essentially, paid for all of petitioner's startup and ongoing costs at Lehman Brothers from the outset. Petitioner did not furnish any additional details with regard to his compensation, including the amount of his draw or the method under which his commissions were calculated or paid.

9. Lehman Brothers had many offices throughout the country. Although Lehman Brothers was involved in municipal bond trading, it had not engaged in any business involving petitioner's hedging specialty and had no capability in that area until petitioner was hired. Petitioner explained that by being able to provide the type of bond portfolio protective or defensive strategies he had developed, Lehman Brothers hoped to, and according to petitioner did, increase the volume of municipal bond business it handled.

10. Petitioner's employer provided equipment, including computers, information systems,

[3]Petitioner noted that after the years in question, there were relatively small numbers of trades involving New York customers Nippon Life Insurance Company and Oppenheimer.

fax machines, and 25 telephone lines for an office in petitioners' home in New Hope, Pennsylvania (the "New Hope office"). The telephone listing for this office was "Shearson Institutional Capital Funding." Petitioner was told by his employer to use the New Hope, Pennsylvania office for whatever work was necessary. Petitioner performed essentially the same type of work at both the New York City and New Hope offices, except for the instructional seminars and meetings which occurred in the New York office. With respect to out-of-State travel to customers' locations, petitioner testified that he visited clients "frequently" to go over various strategies on a "one-to-one basis." Petitioner noted, however, that there was no regular pattern to these visits, and that "[s]ometimes we did the trades from [the customer's] office. Like if I showed [the customer] a strategy, and the market was already moving in a direction that would facilitate that strategy, he might do something while I was there."

11. Lehman Brothers maintained office space in New York City at 200 Vesey Street. Petitioner's "office" with Lehman Brothers in New York City consisted of space in a large open bond trading room. This space, which was part of long rows of such spaces known as "tarts" (as opposed to individual desks), was equipped with information screens tracking the movement of the various markets, and with over 100 phone lines usually directly linked to other customers or trading areas. Petitioner explained that this design allowed interaction between the various traders in the room by yelling or other signals, and was utilized to facilitate such interaction and trading.

12. As designed, the New York City office space did not provide complete security or confidentiality for the individuals working there and the information they possessed, and afforded no "after hours" security regarding such information in the event an employee was allowed to remain in the trading room after other employees left. The New York City trading

office was open from about 6:00 A.M. or 7:30 A.M. until about 6:00 P.M. Petitioner noted that no one was allowed in the offices unless a senior manager was also present, and he further explained that, for security reasons, no one was allowed to remain in the New York City bond trading offices after 6:00 P.M.

13. The commuting time from petitioner's home in New Hope, Pennsylvania to the New York office is approximately two hours, and petitioner explained that he would leave his home at approximately 5:30 A.M. when making the commute to work in the New York office. Petitioner presented a letter from his supervisor at Lehman Brothers during the years in issue. This letter, dated February 13, 1995, provides as follows:

> Our employee, Kenneth Phillips, is a hedger in the bond markets, hedging on world markets for our clients. His expertise, knowledge and constant monitoring around the clock of markets including those in Europe and Japan require Mr. Phillips to work unconventional hours, including times when our offices in New York are not open. This results in his working at his home, weekends, evenings, and some days for our benefit to service our clients dealing in these markets. Because of the unusual hours Mr. Phillips maintains and the service he provides, his presence in our office is not feasible or practical on a daily basis and his office at home has been provided with all of the required equipment (computers, multiple phone lines, real time market-monitoring and facsimile machines) to perform his duties.

14. Petitioner's hedging activities for customers were very sensitive and confidential. Because such activities involved attempting to predict the future movement of markets, and taking positions with respect thereto, his work needed to be kept confidential from other employees in the bond trading department. Petitioner noted that every position he took would have to be "unwound." In this regard, petitioner had to be very circumspect in the hedging activities undertaken at the New York City bond trading offices because of the inherent conflict that would be created if bond traders became aware of the specific hedging strategy of one of petitioner's clients. There is no evidence that petitioner's employer discussed or attempted to set

up a separate or secure office enclosure for petitioner at its New York City offices. Petitioner testified that if he had been enclosed in some way, he "could not have participated in the exchange that I was there to do" (presumably the yelling and interaction among the bond traders in the open room, as described above).

15. In addition to his hedging and trading activities, petitioner also attended meetings and conducted informational presentations giving his opinions on interest rate directions to bond traders, and describing how hedging activities could help the employer generate additional business. Petitioner conducted this activity at his employer's New York City offices.

16. Petitioner testified, in response to the question of what determined the days that he would come into New York rather than stay in Pennsylvania, as follows:

> The main thing was the markets. I mean, we mentioned a minute ago events can begin to transpire well before the New York market is open. And if we perceive things beginning to move, I would begin to contact the customers, or to run the systems. And if we were in the middle of decision-making, or decisions were being or movements were being considered, the customers did not want me out-of-pocket [sic] for the two hours it took to get from the Pennsylvania office to the New York office.
>
> So, the markets were, for the most part, what determined if I could move or not. Otherwise, I would choose to work from the Pennsylvania office, unless I was asked to come in, or there was an opportunity to present some special piece of information to either the salesman [sic] or the traders.

17. The returns filed for the years in question reflect (at Schedule "A") that petitioner worked in and out of New York State and City for the following number of working days:

YEAR	TOTAL DAYS WORKED	DAYS WORKED IN N.Y.	DAYS WORKED OUT OF N.Y.
1991	292	115	177
1992	293	122	172

1993	235	105	130
TOTAL	820	341	479

18. Proposed finding of fact "24" in petitioner's brief states that included in the 479 days worked outside of New York "were 231 days worked outside of the New Hope, Pennsylvania office. Petitioner has provided documentation to the Department of Taxation."

By its brief, the Division responded to this claim as follows:

> Proposed finding of fact 24 has not been proven by petitioners. More specifically, petitioners have not shown that any part of the 231 days worked outside New York were worked other than at petitioners' Pennsylvania home. In fact, a March 28, 1995 letter from petitioners' accountant and representative Howard Goldman states that "[v]irtually all of the days listed out of the office were worked in Pennsylvania at taxpayer's home office". Petitioners have provided documentation of this issue which is currently under review by the Division of Taxation. However, that documentation is not part of the hearing record.

19. Submitted as part of petitioners' brief were proposed findings of fact numbered "1" through "26", with respect to which the following rulings are made:

> -proposed findings "1", "2" (corrected as to the 1991 dollar amount listed therein), "5" through "9", "11" through "13", "17" through "19" and "26" have been accepted and are incorporated above.
>
> -proposed findings "3" and "4" have been omitted as unnecessary.
>
> -proposed finding "10" is rejected insofar as it states the ultimate conclusion that petitioner was in fact compensated based on commissions. The proposed finding is otherwise accepted and expanded to provide more detail concerning petitioner's belief as to his obligation to his employer vis-a-vis "at will" termination.
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> -proposed finding "14" is revised to simply set forth the actual telephone directory listing for the New Hope office, and rejected insofar as the record does not detail who, in fact, listed the New Hope office as the employer's office.
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> -proposed finding "15" is rejected as not supported by the record, which does not indicate that the employer *declined* to set up a secure office for petitioner in New York, but rather only that there was no discussion or offer to do so.

-proposed finding "16" is modified to reflect that petitioner's services did not consist exclusively of executing trades.

-proposed finding "20" is rejected as not supported by evidence in the record, which provides only petitioner's, and not the employer's, view of whether it would have been feasible to set up a separate enclosure for petitioner in New York.

-proposed finding "21" is rejected in that the record does not bear out that petitioner came to the New York office *only* to conduct informational presentations.

-proposed finding "22" is rejected as out of context, in that the record does not reflect that petitioner could carry out his hedging activities only to a limited extent in New York. Rather, the record reflects that *all* bond traders in the open trading room had to be circumspect with their information and positions, and that petitioner had to be especially circumspect in this regard due to the type of activity he engaged in (hedging).

-proposed finding "23" is rejected insofar as it states an ultimate conclusion, and is reworded to reflect the information therein as petitioner's assertions via testimony.

-proposed finding "24" is rejected insofar as its second sentence is not supported by evidence in the record, but is otherwise accepted.

-proposed finding "25" is rejected as it states an ultimate conclusion.

CONCLUSIONS OF LAW

A. Tax Law § 631(a) provides that the New York source income of a nonresident individual (such as petitioner Kenneth Phillips) includes the net amount of items of income, gain, loss and deduction reported in the Federal adjusted gross income that are "derived from or connected with New York sources." Included among these items are those attributable to a business, trade, profession or occupation carried on in this State (Tax Law § 631[b][1]).

B. Tax Law § 631(c) provides, in part, that:

> [i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the [commissioner of taxation], the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

C. Regulations of the Commissioner of Taxation in effect during the years at issue provided as follows:

> [i]f the commissions for sales made or other compensation for services performed by a nonresident traveling salesman, agent or other employee depend directly upon the volume of business transacted by him, his items of income, gain, loss and deduction . . . derived from or connected with New York State sources include that proportion of the net amount of such items attributable to such business which the volume of business transacted by him within New York State bears to the total volume of business transacted by him within and without New York State. (20 NYCRR former 131.17.)

> [i]f the nonresident employee (including corporate officers, but excluding employees provided for in [former] 131.17 of this Part) performs service for his employer both within and without New York State, his income derived from New York sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. (20 NYCRR former 131.18.)

D. Petitioner has raised two bases in challenging the notices at issue. First, petitioner asserts that all of his compensation was commission income based on the volume of bond trades he made for his customers. In turn, petitioner claims that all of his customers were located outside of New York State, and that therefore all of his commission income should be sourced outside of New York State, under 20 NYCRR former 131.17, based on the location of the customers for whom he transacted business. Petitioner cites to ***Matter of O'Connell*** (Tax Appeals Tribunal, March 6, 1997) in support of this position.

Petitioner also argues, alternatively, that if any of his compensation is subject to New York tax, it should not include compensation attributable to days when petitioner did not work in New York State. In this regard, petitioner maintains that he worked outside of his employer's New York State offices during the years in issue, both at the office in his home in New Hope, Pennsylvania and at other locations. Petitioner maintains that those days worked at locations

outside of New York State and not at the New Hope office should in no event be considered New York working days. Furthermore, petitioner asserts that those days worked at the New Hope office should likewise not be considered New York working days. In this regard, petitioner's position is that his work at the New Hope office was not for his own convenience, but rather was performed out of necessity and at the direction of his employer. Petitioner maintains specifically that he was limited in the amount of work he could do in the New York City offices of his employer because of security considerations attendant to his specialized work in hedging, and because of his need to execute trades at the request of his customers on markets which were not open during the hours when his employer's New York City office was open. In this latter regard, petitioner maintains that he could not utilize the New York City office other than during regular hours because of the concerns over the security of other employees' information at such offices.

E. ***Matter of O'Connell*** (***supra***) involved a municipal bond salesman who was a nonresident of New York. Mr. O'Connell did not have a private office in New York, but instead was provided by his employer with a desk and telephone in the employer's New York offices. He was required to travel as a condition of his employment. Based upon an extensive record of documentary evidence and testimony, Mr. O'Connell first established that he was compensated solely by commissions based upon the volume of sales and purchases of bonds he made on behalf of his customers. The petitioner in ***O'Connell*** also established the location of each of his customers and the volume of bond business transacted within New York State (and City) versus the volume transacted at customers' locations outside of New York State. Mr. O'Connell used the physical location of his customers for purposes of allocating his compensation within and without New York State. Upon audit, the Division reallocated premised upon the number of Mr. O'Connell's working days within and without New York State. The Tax Appeals Tribunal, on

appeal, ratified as reasonable petitioner's allocation of his commission income based on the location of the sources of that income (i.e., his customers' locations at the times of the trades) both within and without New York State. The Tribunal observed that where the income is based on commissions, the applicable regulation calls for allocation based on the volume of business transacted out of state to generate commissions, rather than the amount of time spent out of state.

F. Petitioner's argument for application of the method of allocation used in ***O'Connell*** is rejected. In order to allocate under the ***O'Connell*** method, petitioner was required to establish two items, to wit, 1) that he was compensated by commissions based solely on the volume of business transacted and 2) the relative volume of such business, and hence commissions, transacted and earned at customer locations within and without New York State. The shortfall in petitioner's position on this issue is with the proof, which consists solely of his testimony. In this respect, petitioner claims he was entitled to an annual draw, and that his commissions always exceeded such draw. Petitioner, however, could not recall the amount of the draw and, unlike the petitioner in ***O'Connell***, he did not provide any information or specifics concerning his commissions, such as the percentage thereof or the method of calculation or payment. Furthermore, the petitioner in ***O'Connell*** consistently used the described method of allocation on his returns, and clearly disclosed the same to the Division. Petitioner's method of allocation, in contrast, was reported on his returns based on the days worked within and without New York State and City. While the term "draw" is consistent with earnings based on commissions (as in a "draw against commissions"), there is, in addition to the lack of detail from petitioner concerning his compensation, no corroborating information from petitioner's employer in support of his claims. In sum, there is a paucity of detail to support the claim that petitioner was compensated for all of the services he performed for his employer (including providing informational seminars

for other bond traders) solely by commissions based on the volume of business transacted (***see, Matter of Dalenz v. State Tax Commn.***, 9 AD2d 599, 189 NYS2d 348).

In addition, and even assuming or accepting that petitioner was paid only via commissions, there remains the issue of the location of petitioner's customers with whom business was transacted. On this score, petitioner again only offers his testimony that all of his customers were located outside of New York State and all business he transacted occurred outside of New York State with these customers. In ***O'Connell*** the petitioner established, by an extensive evidentiary presentation, the necessity of meeting out-of-State customers at their out-of-State locations. Here, petitioner spoke in testimony of meeting with customers at their locations, and noted that if a particular strategy appealed to a customer and if the market at the time facilitated that strategy, the customer might do something while petitioner was there (***see,*** Finding of Fact "10"). This testimony is not compelling support for a conclusion that all customers were located outside of New York, or that all trades occurred outside of New York. The record contains no documentary evidence of even one trade pertaining to a customer located outside of New York State (nor, for that matter, of any trades either inside or outside of New York State). No statements from any of petitioner's customers were provided.

It is unclear why no documentary evidence was provided in support of either of petitioner's assertions. It would not seem unduly difficult for petitioner to have at least found some documentary evidence available or obtainable in support of his assertions. In short, petitioner has offered only his uncorroborated testimony in support of the assertion of two key factors--that he was compensated solely based on commissions and that all transactions giving rise to such commissions occurred with customers located outside of New York. It is not insignificant that the effect of accepting petitioner's assertions not only serves to cancel the asserted deficiencies,

but essentially results in a conclusion that petitioner *transacted* no business of any nature on behalf of his employer in New York State. This conclusion is at least inconsistent with the record as a whole, in light of petitioner's testimony that he did essentially the same types of things in both the New York and New Hope offices, save for the informational seminars conducted in New York. It is entirely *possible* that petitioner may have been compensated by commissions generated by and based solely on business transacted entirely with out-of-State customers at their out-of-State locations. However, in light of the lack of any corroborating evidence and the apparent inconsistencies, petitioner's testimonial claim alone is insufficient to carry petitioner's burden. Accordingly, petitioner has not proven that he is entitled to allocate his compensation on the basis of the volume of business transacted in and out of New York State under 20 NYCRR former 131.17 and ***Mattter of O'Connell.***

G. Treated next is the issue of allocation based on the number of working days spent in and out of New York State, per 20 NYCRR former 131.18. As set forth, petitioner claims the allocation reported on his tax returns was accurate and justified because his out-of-State work was required as part of his job. There are two facets to petitioner's position, to wit, the assertion that a total of 479 days were worked outside of New York during the years at issue, and the assertion that 231 days out of such 479 total days were worked outside of New York and *not* at the office in petitioner's home in New Hope.

H. Petitioner's allocation of compensation within and without New York State, specifically on the basis of days worked at the office in his home in New Hope, turns on whether such days were worked outside of his employer's New York office of necessity in the service of his employer and not for his own convenience. This so-called "convenience of the employer" test is set forth at 20 NYCRR former 131.16, which provided, in relevant part, as follows:

"any allowance claimed for days worked outside of the State must be based upon the performance of services which of necessity - as distinguished from convenience - obligated the employee to out-of-state duties in the service of his employer."

I. The case law on this issue supports the convenience versus necessity test as valid (***Matter of Speno v. Gallman,*** 35 NY2d 256, 360 NYS2d 855) and holds in essence that services performed at an out-of-State home, which could have been performed at the employer's in-State office, are performed for the employee's convenience and not for the employer's necessity (***id., see Matter of Fass v. State Tax Commn.,*** 68 AD2d 877, 414 NYS2d 780, ***affd*** 50 NY2d 932, 431 NYS2d 526; ***Matter of Colleary v. Tully,*** 69 AD2d 922, 415 NYS2d 266; ***Matter of Wheeler v. State Tax Commn.,*** 72 AD2d 878, 421 NYS2d 942; ***Matter of Kitman v. State Tax Commn.,*** 92 AD2d 1018, 461 NYS2d 448). Even though an office in an employee's home may be equipped by and intended for an employer's purposes, it must also be established that the employee's work was performed there of necessity for the employer (***Matter of Fischer v. State Tax Commn.,*** 107 AD2d 918, 489 NYS2d 345). Thus, it is not dispositive that petitioner's employer equipped the office in New Hope, or that such office was listed in the local telephone directory under the name Shearson Institutional Capital Funding.

J. In ***Matter of Kitman v State Tax Commn. (supra)*** the court observed that "[b]ecause of the obvious potential for abuse, where the home is the workplace in question, the [former State Tax Commission] has generally applied a strict standard of employer necessity in these cases, which, with rare exception, has been upheld by the courts [citations omitted]." One such exception of note was ***Matter of Fass v. State Tax Commn. (supra)*** where the court found the employee's out-of-State services at his home to be for the employer's necessity. However, the services at issue in ***Fass***, testing and investigating new products, did not involve an office per se,

but rather required access to highly specialized facilities including ballistics equipment, a firing range, garages, stables, kennels, and sophisticated testing and evaluating of equipment. This equipment was, concedely, not available at or near the employer's office. In later cases, such as ***Matter of Wheeler v. State Tax Commn (supra)*** and ***Matter of Kitman (supra)*** the court distinguished the type of services, and required facilities and equipment, in ***Fass*** from the services, office equipment and circumstances of an expert in trading, selling and underwriting municipal bonds (***Wheeler***) and a television reviewer and critic (***Kitman***).

More specifically, in ***Wheeler*** the claim of necessity was premised on the arguments that the petitioner had to work on weekends performing various analyses in order to be prepared for the next week's bond market activity, and that the employer's New York office was unavailable to petitioner because an alarm system was activated on weekends and because the mail at the office was not sorted. In ***Kitman***, the claimed at-home necessity was based on the petitioner's need for specialized equipment (four television sets and a video tape recorder) not installed at the employer's New York office, the potential disruptive effect of this equipment on other employees in the New York office, the long hours worked by the petitioner (6:00 A.M. until past midnight) monitoring several television channels at once on multiple televisions, and the specialized style of writing requiring input from petitioner's family who would not be available at the New York office.

In both cases the court rejected the claim that performing the services at home was required as an absolute necessity from the employer's standpoint. In ***Wheeler***, the court concluded that "[w]ith the exercise of but a minimum of ingenuity and effort, the office could have been available to petitioner." In ***Kitman***, the court, relying on ***Wheeler,*** noted "there is no evidence showing that the office could not be set up in such a way as to *insulate petitioner* from

the other workers [citation omitted]." (Emphasis supplied.) The court further observed, with respect to the claim of need for access to his family for input, that "again, with the exercise of a little ingenuity, some means (possibly a special telephone line) could be devised for him to get input from them [citation omitted]."[4]

K. Petitioner claims that the out-of-State work at the New Hope office was required because that office, outfitted by his employer with substantial communications, data processing and transmission equipment (presumably similar to and compatible with the equipment at the employer's New York office), permitted market monitoring and trading at all hours of the day and night, and provided security with respect to other employees' information and from inadvertant disclosure of petitioner's hedging positions. Petitioner maintains that his employer's economic considerations, but not petitioner's convenience, dictated the decision to set up the facility in petitioner's residence. The record in this case contains only one letter from petitioner's employer, and this letter speaks only to the unconventional hours that petitioner sometimes worked, including hours when the New York office was not open thus leaving it not "feasible or practical" for petitioner to be in the New York office on a daily basis. However, this letter, and petitioner's testimony, must be contrasted with the lack of any confirming documentary evidence that petitioner, while perhaps monitoring markets on an ongoing basis at all times, conducted any trades during "off hours", as well as with the fact that he, according to the allocation reported on petitioners' returns, spent over 100 days in the New York office during each of the years in issue. Petitioner was clearly able to conduct his activities in the New York office (***see,*** Finding of Fact "10"), and he spoke of the communication advantages of the open trading room there. In this

[4]Further contrasting ***Fass*** with ***Kitman,*** it seems a safe assumption that any potential disruption to other employees in the office caused by Mr. Kitman's simultaneous viewing of multiple television sets would be far less than the potential disruption caused by Mr. Fass in discharging various firearms in the office.

regard, petitioner stated that an enclosure in New York would not have been feasible because it would have prevented petitioner from participating in the necessary exchange with other bond traders in the open room (***see,*** Finding of Fact "14"). However, at the same time, it is clear that petitioner could not have been participating in such exchange when he was working at the office in his residence in New Hope. As to the specialized equipment, it would appear that such equipment was all available at the New York office. Further, with regard to security issues, it appears that with a minimum of effort, expense and ingenuity, an enclosure accessible to petitioner, secure for petitioner, and secured from the open trading room (including during off hours) could have been provided. Presumably, with his numerous copyrights and expertise in hedging and bonds, and with the customers he brought with him to Lehman Brothers, petitioner would have had some input, if not outright leverage, as to the terms or circumstances of where and when he would work. In this regard, the two-hour commuting distance between petitioner's home and his employer's New York office is not an insignificant consideration in the circumstances of this case. Petitioner's testimony is telling, in the statement that unless there was a meeting or he was asked to come to the New York office, he would "choose" to work at the New Hope office (***see,*** Finding of Fact "16"). In sum, the record in this case does not compel a conclusion that petitioner's services could not have been performed at his employer's New York office, and that the services performed at the office in petitioner's residence in New Hope were performed there of necessity from the employer's standpoint and not for petitioner's convenience.

L. Finally, there is the issue of the alleged non-New York State and non-New Hope working days. Such days, allegedly numbering 231 over the three years at issue, were raised by petitioner in his proposed findings of fact. The Division in response disputes that the

documentary evidence, provided to the Division but not offerred for inclusion in the record here, supports the claim that the days were worked at out-of-State locations other than the New Hope office. Assuming that such days were indeed worked outside of New York State and outside of the New Hope office, perhaps for the necessary purpose of meeting with his customers, it would appear that petitioner would be entitled to utilize such days in allocating his compensation within and without New York. Unfortunately, the record does not contain either the documentary items provided by petitioner to the Division or any detail as to the times, places and purposes of any working visits by petitioner to locations other than the New York office and the New Hope office. In fact, the claimed 231 days in petitioner's proposed findings of fact are not further broken out by individual year such that, from the information provided in the proposed fact, a per year allocation ratio could be determined. Without such information, there is no basis upon which to support a conclusion that petitioner is entitled to use such claimed days in an allocation of his compensation within and without New York State, nor any basis upon which to arrive at such an allocation for each of the three years in question. The parties agreed that the documentation concerning the non-New York State and non-New Hope days would be dealt with separately by the parties after the hearing with the aim of mutually agreeing upon a number of such days as allocable non-New York State days. As evidenced by the remarks in their briefs, the parties were unable to agree. While it was anticipated that documentation concerning any disputed days could be submitted by the parties, there has been no move or request to do so. The Division clearly rejected the claim that petitioner has established that 231 days were worked out of New York State at locations other than the New Hope office. Petitioner, in turn, raised no specific response in his reply brief, and has not moved to include the documentation in the record. It is therefore possible that the issue has been abandoned. In any event, given the dispute

on this issue as described, yet having no evidence in the record and no request to include such evidence upon which to resolve the issue, leaves no basis upon which to grant an allocation of income within and without New York State based on days worked outside of New York State at locations other than the New Hope office.

M. The petition of Kenneth and Rosemary Phillips is hereby denied and the notices of deficiency dated December 14, 1995 are sustained.

DATED: Troy, New York
May 21, 1998

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE